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# Confidentiality and Faculty Representation in Academic Governance

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*The statement that follows was prepared by a subcommittee of the Association's Committee on College and University Governance and approved for publication by the parent committee.*

In recent years, the Association has received an increasing number of complaints from faculty members whose service on a variety of institutional governance bodies has been conditioned on their agreeing to confidentiality—sometimes including secrecy before, during, and after deliberations—although they serve on those bodies as designated representatives of the faculty. In some cases, faculty members have been required to sign formal confidentiality agreements.<sup>1</sup>

The present statement argues that, except in personnel matters, imposing a precondition of confidentiality on faculty representatives serving on institutional governance bodies is incompatible with AAUP-supported governance standards and that those who would seek to impose various degrees of

confidentiality in decision-making processes should be required to justify their position.<sup>2</sup>

The AAUP's *Statement on Government of Colleges and Universities* identifies decision-making areas in which the faculty should have primary responsibility, such as matters of curriculum and faculty status, and areas in which the faculty does not have primary responsibility but nevertheless should participate jointly and meaningfully with the governing board and the administration. In major areas of decision making, regardless of whether the faculty's responsibility is primary, the *Statement on Government* calls for the establishment of "[a]gencies for faculty participation in the government of the college or university," such as a "faculty-elected senate or council," for which "[f]aculty representatives should be selected by the faculty according to procedures determined by the faculty."<sup>3</sup> The Association's statements on *The Role of the Faculty in Budgetary and Salary Matters* and *Faculty Participation in the Selection, Evaluation, and Retention of Administrators* elaborate on the principles set forth in the *Statement on Government* and speak specifically of the role of faculty representatives.

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1. At Idaho State University, faculty members participating in a task force reviewing institutional governance policies and procedures were required to sign the following agreement: "I acknowledge that my participation in the meetings of the Advisory Group on Faculty Governance Committee is done under conditions of strict confidentiality and that I will not share or discuss the discussions had, presentations made, or any material presented or distributed with anyone not on this committee" ("College and University Governance: Idaho State University," *Bulletin of the American Association of University Professors* 97 [2011]: 72, note 10). At Carleton College, those faculty members who met with finalists in the 2010 presidential search report having been required to sign confidentiality agreements. See [http://apps.carleton.edu/campus/president/search/updates/?story\\_id=621762](http://apps.carleton.edu/campus/president/search/updates/?story_id=621762).

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2. Consideration of senior faculty status for a candidate for a senior academic administrative position may fall into the category of faculty personnel matters.

3. AAUP, *Policy Documents and Reports*, 10th ed. (Washington, DC: AAUP, 2006), 139, <http://www.aaup.org/report/1966-statement-government-colleges-and-universities>.

Confidentiality requirements are more likely to be imposed in certain areas where the faculty does not have primary responsibility: budgeting in the broadest sense, including the development of salary and benefit policies; administrative searches; and long-range planning, also conceived broadly. Administrations, rather than faculty senates, have tended to appoint ad hoc groups to make decisions in these areas, despite the admonition of the *Statement on Government* that the faculty should select its own representatives. A central feature of these three kinds of governance activities is the extent to which the results of the deliberations have ramifications for the faculty collectively. For example, deliberations over faculty salary policies involve significant collective consequences, as do decisions about the appointments of provosts or other senior academic administrators. Whenever the work of a decision-making body entails such consequences, the faculty members on the body should consult periodically with the colleagues whom they represent by keeping them informed of the body's discussions and by soliciting their views regarding the matters under consideration.

The decision-making areas cited above differ from those of faculty committees dealing with such matters as appointments, reappointments, tenure, promotions, grievances, or internal grants. In these decision-making areas, faculty members are elected, selected, or appointed not so much to represent their faculty colleagues as to exercise their own professional judgment in interpreting and applying relevant faculty-established criteria. This distinction—as well as the need to protect individuals' privacy—is critical to understanding why one but not another kind of governance activity should appropriately be conducted with an expectation of the highest degree of confidentiality, to which exceptions (for example, discovery processes at law) would be rare.

Lesser degrees of confidentiality may be invoked in other circumstances, but each claim of confidentiality must be justified discretely. Discrete justification means, for example, that a committee member might offer privileged information conditioned on its remaining confidential to a committee; a faculty representative might nevertheless then inform constituents, without revealing the content, that a pending decision has been strongly influenced by privileged information. The enumeration of exceptions to confidentiality would normally include a representative's ability to consult with persons whose expertise is critical.

Representation, like confidentiality, admits of degrees and modes. Except in the smallest colleges, direct democracy is impossible, and even in those institutions, committees may deliberate and offer advice before the faculty as a whole casts its vote. When such committees are elected rather than appointed, the opinions expressed by representatives can reasonably be expected to mirror the views of their constituents, implying a high level of consultation. At large universities at the opposite end of the spectrum, the so-called broker system of representation is widespread: constituents, having elected their representatives to a body, resist attempts at consultation, often for the good reasons that the matter under discussion is far outside their own areas of expertise or that they have other governance issues about which to deliberate and provide advice at the department, school, or university level. In the modern university, it is common for a faculty member to occupy a position across several units, each of which may view participation in governance as an expected form of service to the institution. Equally common is a system in which a faculty senate or similar body is elected, but virtually all other faculty participants in governance are then selected by the senate or by the senate in cooperation with the administration; in such cases, representatives may report to and consult with the senate. Institutions should have policies on the nature of representation in various circumstances that reflect the best aspects of their cultures of governance.

*Budget discussions.* The Association's statement on *The Role of the Faculty in Budgetary and Salary Matters* provides that an "elected representative committee of the faculty [should participate] in deciding on the overall allocation of institutional resources and the proportion to be devoted directly to the academic program" and that such a committee will be of "critical importance in representing faculty interests and interpreting the needs of the faculty to the governing board and president."<sup>4</sup> Imposing a blanket requirement of confidentiality on committees that advise the administration on budgetary matters is inconsistent with this basic AAUP-recommended governance standard.

*Searches for higher administrative officers.* Unless mandated to be open by state law, many such searches have an initial, confidential screening stage conducted by a search committee that includes faculty members. The next stage is normally one in which finalists are

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4. *Ibid.*, 149–50.

interviewed. At this point in the process, the names of finalists should be made public to the campus community so that the community at large, faculty committees, or at least selected faculty members have an opportunity to interview the finalists and forward their views to the search committee or to a consulting firm employed by the college or university.

Recent years have witnessed an increased tendency to keep searches confidential, with little or no faculty involvement. Two primary reasons seem to account for the trend: candidates for positions are usually administrative officers elsewhere and do not want it known on their home campuses that they are seeking other employment, and search-consultant firms engaged by colleges or universities have sought to take on (and thus be compensated for) ever-greater responsibility in searches, including functioning as evaluators of candidates. These firms may lack appreciation for the ways in which the mission of an institution of higher education differs from that of a corporation or from some other types of nonprofit organizations. Faculty members should be aware of this possibility when searches are in prospect.

The following principles on confidentiality in faculty searches, set forth in the statement on *The Ethics of Recruitment and Faculty Appointments*, demonstrate the Association's support for the right of a candidate to withdraw from the search at the time finalists are publicly announced, and these principles are clearly applicable to administrative searches as well: "Institutions should respect the confidentiality of candidates for faculty positions. The institution may contact references, including persons who are not identified by the candidate, but it should exercise discretion when doing so. An institution should not make public the names of candidates without having given the candidates the opportunity to withdraw from the search."<sup>5</sup>

AAUP-recommended standards call for faculty participation in searches for administrators commensurate with "the primacy of faculty concern" in the particular position.<sup>6</sup> Searches with an open (usually

final) stage are thus preferred when the administrative role is expected to involve extensive interaction with faculty members. Even a confidential search should involve representatives from as many of the institution's applicable faculty constituencies as possible. If this objective would be impracticable to accomplish with the search committee itself, then it should be accomplished through the interview process.

*Long-range planning.* The *Statement on Government* asserts that "[t]he framing and execution of long-range plans" is "one of the most important aspects of institutional responsibility" and "should be a central and continuing concern in the academic community."<sup>7</sup> Long-range planning projects—which can entail major decisions related to budget, institutional organization, academic programs, majors, and faculty personnel—often are undertaken by appointed institutional task forces in which faculty members may constitute a minority. Regardless of their numbers or minority status, faculty members who participate in such projects under the constraints of complete confidentiality would represent the faculty only in the minimal sense of serving as the agents of the faculty, in many cases undermining the type of joint decision making that characterizes the best of shared academic governance. In any event, some level of consultation should be expected.

A scenario in which confidentiality of *all* deliberations is a condition of participation in a particular governance activity denies faculty representatives the opportunity to ascertain the views of their constituents and speak on their behalf. In cases where a direct form of representation is desirable, a confidentiality requirement with respect to a committee's deliberations isolates representatives from those whom they represent and diminishes the weight accorded their statements. By contrast, administrative officers serving on governance bodies in many cases represent the administration directly; they are not obliged to keep information confidential from those administrative officers to whom they report. Depriving faculty

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5. *Ibid.*, 179–80.

6. The *Statement on Government* indicates that the selection of a president should "follow upon a cooperative search by the governing board and the faculty" and that the "selection of academic deans and other chief academic officers should be the responsibility of the president with the advice of, and in consultation with, the appropriate faculty" (*ibid.*, 137). The derivative *Faculty Participation in the Selection, Evaluation, and Retention of Administrators* refers to the "primary role" of the faculty

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and governing board in the search for a president and identifies the role of the faculty in searches for administrators other than the president as reflecting "the extent of legitimate faculty interest in the position." It further identifies academic administrators such as "the dean of a college" as "directly dependent upon faculty support," and it concludes by noting that "sound academic practice dictates that the president not choose a person over the reasoned opposition of the faculty" (*ibid.*, 145).

7. *Ibid.*, 136.

representatives of the opportunity to speak on behalf of their constituents thus amplifies the already significant asymmetry of power. In areas such as budgeting, administrative searches, and long-range planning, where the faculty does not exercise primary responsibility, the ability of faculty representatives to convey the views of their constituents should lend more authority to their statements. Imposing complete confidentiality as a prerequisite for participation in governance bodies reduces the extent to which the views of the broader faculty will be brought to bear on the issues at hand and thus frustrates one of the chief purposes of shared academic governance.

In its 2009 report *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, Committee A on Academic Freedom and Tenure recommended that colleges and universities include speech on institutional matters under handbook or collective bargaining agreement definitions of activities protected by academic freedom. This recommendation was based on the AAUP's conception of academic freedom as including "the freedom . . . to address any matter of institutional policy or action" as a participant in institutional governance.<sup>8</sup> By limiting the faculty's ability to address such issues, confidentiality agreements effectively curtail academic freedom.

When faced with unreasonable confidentiality requirements, faculty members may find themselves in a dilemma. If they refuse to submit to them and therefore decline to serve, the faculty's role in that particular governance body, activity, or decision is thereby diminished or eliminated entirely. The administration may charge recusant faculty members, because of an unacceptable requirement, with being uncooperative or uncollegial and even with declining generally to participate in governance service. On the other hand, if faculty members choose to participate under such conditions, the faculty role will be compromised, and the outcome may be at odds with the will of the faculty. In an attempt to legitimize the undertaking, an administration will be able to state that faculty members did participate. Apart from personnel matters, therefore, the faculty must insist that advocates of confidentiality be required, in each particular instance, to demonstrate that the need for secrecy outweighs the need for transparency. A senate or similar representative faculty body can create these favorable conditions

for the work of faculty representatives by establishing standards of conduct and recommending their incorporation into the faculty handbook or collective bargaining agreement.<sup>9</sup> The expectation of consultation is an essential element of shared governance.

### **Recommendations**

1. Because requiring a pledge of confidentiality as a precondition for participation in any governance activities, other than serving on committees that deal with personnel matters, is incompatible with widely accepted standards of shared governance, faculty members should not agree to preemptive confidentiality mandates or agreements.
2. Confidentiality expectations appropriate to various modes of participation in governance should be specified, and faculty representatives should be mindful of their responsibility to keep their constituents informed and to seek their opinions.
3. Searches for presidents and other chief academic officers should have an open phase that allows individual faculty members as well as faculty bodies to review the credentials of finalists, ask questions, and share opinions before a final decision is made. ■

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8. *Academe* (November–December 2009): 88, <http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf>.

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9. At the University of Memphis, the faculty senate asks faculty representatives to sign a "Faculty Representative Agreement" that states, "As an appointed faculty representative, you are to represent the opinions and interests of the faculty as a whole, not just your own opinions and interests." It includes the following expectation: "After each committee meeting, e-mail a brief summary report of the meeting to the office of the Faculty Senate so that all faculty can be informed of committee activities via the senate's web site."